No. 08-372

Supreme Court, U.S.
FILED
NOV - 7 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY LLC; MOTIVA ENTERPRISES LLC; SHELL OIL COMPANY, INC.,

Petitioners,

v.

MAC'S SHELL SERVICE, INC.; CYNTHIA KAROL; JOHN A. SULLIVAN; AKMAL, INC.; SID PRASHAD; RAM CORPORATION, INC.; J&M AVRAMIDIS, INC.; STEPHEN PISARCZYK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY FOR PETITIONERS

PAUL D. SANSON
VAUGHAN FINN
KAREN T. STAIB
SHIPMAN & GOODWIN LLP
One Constitution Plaza
Hartford, CT 06103
(860) 251-5000

JAMES COWAN
SENIOR COUNSEL
SHELL OIL COMPANY
P.O. Box 2463
Houston, TX 77252-2463
(713) 241-4039

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

MACEY REASONER STOKES
DAVID M. RODI
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995
(713) 229-1234

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Shell Oil Products Company LLC, Motiva Enterprises LLC, and Shell Oil Company, Inc., state that the corporate disclosure statement included in the petition remains accurate.

TABLE OF CONTENTS

		Page
I.	The Circuits Are Squarely Divided	1
II.	The Issue Is Important	6
III.	The First Circuit's Decision Is Incorrect	7
IV.	This Case Is An Ideal Vehicle	9
Conclusion		10

TABLE OF AUTHORITIES

CASES

Abrams Shell v. *Shell Oil Co.*, 343 F.3d 482 (5th Cir. 2003) 5, 6

Barnes v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986) 1, 4

Boyle v. *United Techs. Corp.*, 487 U.S. 500 (1988) 9

Clark v. *BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998) ..... *passim*

Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 8

Little Oil Co. v. *Atl. Richfield Co.*, 852 F.2d 441 (9th Cir. 1988) 2

May-Som Gulf, Inc. v. *Chevron U.S.A., Inc.*, 869 F.2d 917 (6th Cir. 1989) 3, 4

McGinnis v. *Star Enter.*, No. 93-1234, 1993 WL 455587 (5th Cir. Oct. 21, 1993) 5

Portland 76 Auto/Truck Plaza, Inc. v. *Union Oil Co. of Cal.*, 153 F.3d 938 (9th Cir. 1998) 1, 2, 4, 8

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND RULES

15 U.S.C. § 2802 ..... 7, 8, 9

15 U.S.C. § 2806 8

5th Cir. R. 47.5.3 5

MISCELLANEOUS

Corbin on Contracts (rev. ed. 2003) 7

C.J.S. *Contracts* (1999) 7

S. Rep. No. 95-731 (1978) 8

Wright & Miller, *Federal Practice and Procedure* (3d ed. 2008) 9

REPLY FOR PETITIONERS

Plaintiffs do not dispute that the issue in this case is parallel to the issue they raise in their petition (No. 08-240). Nor do they seriously dispute the importance of the question presented. Instead, plaintiffs argue there is no circuit conflict. That claim is plainly wrong: The courts of appeals are squarely divided in both reasoning and results. Given Congress's desire for uniformity in this area, see Pet. 24-25, that conflict warrants this Court's review.

I. THE CIRCUITS ARE SQUARELY DIVIDED

The First Circuit below, like the Fourth Circuit in *Barnes* v. *Gulf Oil Corp.*, 795 F.2d 358 (4th Cir. 1986), held that a dealer can claim it was "constructively terminated" in violation of the PMPA without showing a "total breach" of its franchise agreement, a "complete deprivation of a statutory element of the franchise" (*i.e.*, the trademark, motor fuel, or premises), or an "actual severance of the relationship." Pet. App. 18a-19a. Instead, those courts allow claims for constructive termination "'even though the plaintiffs continue[] to operate the business.'" *Id.* at 18a. As explained in the petition (at 17-20), the Ninth and Sixth Circuits reached the opposite result in *Portland 76 Auto/Truck Plaza, Inc.* v. *Union Oil Co. of California*, 153 F.3d 938 (9th Cir. 1998), and *Clark* v. *BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998).

A. Plaintiffs ignore the Ninth Circuit's actual reasoning in *Portland 76*. The Ninth Circuit "assume[d] for purposes of discussion * * * that constructive termination may give rise to a claim under the Act," but held that a dealer could not claim it was constructively terminated if it continued to operate its franchise: "For the assignment to have amounted to a constructive termination," the court held, "it would have had to force Portland 76 out of its business." 153 F.3d at 948. The dealer thus lost because it "stayed in business until the time came for re-

newal." *Ibid.* That holding cannot be reconciled with the First Circuit's holding below that actual severance is not required because, in its view, "requir[ing] an actual abandonment of years of work and investment * * * would be unreasonable.'" Pet. App. 18a. The dealers here clearly would have lost under the Ninth Circuit's standard: Like Portland 76, they were "not force[d] * * * out of business" but rather "stayed in business until the time came for renewal." 153 F.3d at 948. Plaintiffs assert that *Portland 76* is irrelevant because "the Ninth Circuit has not yet decided whether a constructive termination claim is viable under the PMPA." Br. in Opp. 14. But speculation that the Ninth Circuit might eventually reject constructive termination claims altogether—creating an even *wider* rift with the First and Fourth Circuits—does not eliminate the square conflict that already exists.

Plaintiffs suggest that the Ninth Circuit's earlier decision in *Little Oil Co.* v. *Atlantic Richfield Co.*, 852 F.2d 441 (9th Cir. 1988), authorized constructive termination claims whenever a franchisor engages in "unduly burdensome and overbearing" conduct. Br. in Opp. 15. But *Little Oil* held no such thing. After the jury there rejected a constructive termination claim, the *dealer* challenged the instructions on appeal. 852 F.2d at 444. Noting the "paucity of authority" supporting constructive termination claims, the Ninth Circuit held that the district court had not erred in requiring proof of overreaching because, "[i]f the [conduct was] not 'unduly burdensome and overbearing,' no 'constructive' termination could have occurred." *Id.* at 444-445. *Little Oil* did not address whether there was anything *else* a dealer had to prove. By contrast, when *Portland 76* reached that issue 10 years later, it squarely held that the dealer must also show it was "force[d] * * * out of its business." 153 F.3d at 948.

B. Plaintiffs fare no better in distinguishing the Sixth Circuit's decision in *Clark*. They claim that there was no

breach of the agreement in *Clark*—that the "open price term * * * could be freely changed." Br. in Opp. 1, 14. But the Sixth Circuit expressly held that the constructive termination claim failed *whether or not* there was a breach, because the dealer continued to operate his franchise with all three statutory elements (trademark, fuel, and premises): *"[E]ven if Clark can establish a breach of the price term*, it does not trigger the protections of the PMPA since he still retains use of BP's trademark, use of the Emerald-Mart premises, and continues to receive BP-branded motor fuel." 137 F.3d at 392 (emphasis added). Because "Clark d[id] not claim that [the franchisor] *refuses to supply him with gasoline*," his claim failed. *Id.* at 391 (emphasis added).

The court later questioned whether Clark could show a breach. 137 F.3d at 392. Clark argued that the open price term was breached in light of the Tennessee Commercial Code's good-faith requirement and the parties' course of dealing. *Ibid.* But the court declined to resolve that claim, stating that the "PMPA is simply not concerned with" it. *Ibid.* The court instead directed the dealer to pursue the argument "in state court on the remand of his claim for breach of [contract]." *Ibid.* Plaintiffs cannot distinguish *Clark* on a ground—the purported absence of a breach—that the court declined to resolve and expressly deemed irrelevant.

Plaintiffs also urge that both *Clark* and the decision below relied on *May-Som Gulf, Inc.* v. *Chevron U.S.A., Inc.*, 869 F.2d 917 (6th Cir. 1989). Br. in Opp. 6-8, 12-13. But the fact that two cases cite the same precedent hardly negates the conflict. *May-Som* held that a franchisee claiming constructive termination by an assignee "must prove either: (1) that by making the assignment, the franchisor breached one of the three statutory components of the franchise agreement * * * ; or (2) that the franchisor made the assignment in violation of state law."

869 F.2d at 922. The case thus held that a breach is *necessary* for a constructive termination, not sufficient. In *May-Som*, the plaintiff could not even show a breach, so there was no reason to address whether dealers could claim constructive termination while continuing to operate. See *id.* at 923. *Clark*, by contrast, reached that issue. And *Clark* held that, "even if [the dealer] can establish a breach of the price term," he could not show constructive termination because he continued to operate using the same trademark, premises, and fuel. 137 F.3d at 392.

Plaintiffs' remaining efforts to distinguish *Clark* rely on portions of the opinion that address unrelated issues. For example, the passage in *Clark* distinguishing *Barnes* (Br. in Opp. 14) concerned whether the assignment violated state law. 137 F.3d at 393. Although plaintiffs now attempt to reinvent the First Circuit's rationale as resting on that ground—asserting that Shell's assignments to Motiva were "'invalid under state law'" because they "increased the dealers' burdens," Br. in Opp. 13, 17—the First Circuit's opinion does not rely on such a theory. The theory also lacks merit: While Motiva's *cancellation of the rent subsidy* more than a year after the assignments may have "increased the dealers' burdens," the *assignments themselves* had no such effect. See *Portland 76*, 153 F.3d at 948 (rejecting a similar argument).[1]

Plaintiffs simply cannot escape the fact that they would have lost in the Sixth Circuit under *Clark*. Just as the plaintiff in *Clark* claimed the refiner charged more for fuel than the franchise agreement allowed, 137 F.3d

---

[1] Plaintiffs also assert that *Clark* involved "price supports" found to be unenforceable. Br. in Opp. 14. But the "price supports" claim was separate from the challenge to the underlying price term. See 137 F.3d at 393. Only the latter claim was at issue in the relevant portion of the opinion. See *id.* at 391-392.

at 392, plaintiffs here claimed that Motiva charged more for rent than the franchise agreements allowed. But just as the refiner in *Clark* did not "refuse[] to supply [the dealer] with gasoline," *id.* at 391, Motiva did not refuse to allow plaintiffs to occupy the premises. The Sixth Circuit held that a mere breach of the price term for a statutory franchise element is not the same as a *refusal to provide* that element, and thus does not establish a "constructive termination" under the PMPA. *Id.* at 392. By contrast, the First Circuit held that a breach of the price term for a statutory element—the lease of the premises—*was* sufficient to establish a "constructive termination" here.

C. Plaintiffs make no effort to dispute that the district courts are in total disarray. See Pet. 22. They urge that those conflicting decisions reflect a "misreading of circuit court decisions." Br. in Opp. 15 n.5. But they offer no reason to accept their own self-serving assertion of settled uniformity when district courts across the country perceive no such consensus.

Plaintiffs also concede (at 11-12 n.4) that the decision below conflicts with the Fifth Circuit's decision in *McGinnis* v. *Star Enterprise*, No. 93-1234, 1993 WL 455587 (5th Cir. Oct. 21, 1993). *McGinnis* declared that "[t]he plain meaning of the statute does not provide for 'constructive termination,'" and refused to allow such a claim where the plaintiff "continued as a franchisee." *Id.* at *4. That decision, although unpublished, is precedential under the Fifth Circuit's rules. See *Abrams Shell* v. *Shell Oil Co.*, 343 F.3d 482, 487 (5th Cir. 2003) (citing 5th Cir. R. 47.5.3). And it rejects the theory on which plaintiffs prevailed here.[2]

---

[2] Plaintiffs urge that *McGinnis* is "at odds with the recognition in *Abrams Shell* that the Act provides for constructive termination." Br. in Opp. 12 n.4 (citation omitted). But *Abrams Shell* nowhere recognizes such claims, much less where the plaintiff continues as a

II. THE ISSUE IS IMPORTANT

Plaintiffs do not seriously dispute the importance of the question presented. They agree that tens of thousands of dealers and their franchisors have similar agreements. Pet. in No. 08-240, at 3. They do not deny the harm the legal uncertainty inflicts on an industry with ongoing restructurings. Pet. 27. Instead, they single out the impact on federal-state relations (Pet. 25-26), denying that the decision below allows plaintiffs to convert ordinary breach-of-contract claims into federal constructive termination claims under the PMPA. Br. in Opp. 16-17.

Plaintiffs' inability to articulate a coherent distinction between mere contract breaches and constructive terminations, however, underscores the decision's impact. According to plaintiffs, this case involved a constructive termination rather than a mere contract breach because the rent subsidy was "of such material importance to the dealers" that its cancellation "effectively terminated" their franchise agreements, leaving them operating their franchises under "what in reality were Motiva leases sans the rent subsidies." Br. in Opp. 16-17. That metaphysical description provides no meaningful standard. Plaintiffs nowhere explain what makes a breach of a price term "so material" that it transmogrifies into a termination even though the dealer continues to operate as a franchisee. Under plaintiffs' standard, franchisors will confront PMPA claims in virtually every contract dispute involving rent, fuel supply, or trademark rights, so long as the dealer alleges that the breach was sufficiently "material" to it. That does not merely allow dealers to

---

franchisee. Rather, the court noted that a prior Fifth Circuit decision had "declin[ed] to decide whether the PMPA permitted constructive termination claims." 343 F.3d at 487. Following that earlier decision, it held that the claims failed *even if* constructive termination was a valid theory. See *id.* at 487-488.

distort the PMPA by leveraging ordinary contract disputes into federal lawsuits threatening punitive damages and attorney's fees. It also undermines the traditional state authority that Congress meant to preserve when it limited the PMPA—and its preemptive scope—to terminations and non-renewals.

III. THE FIRST CIRCUIT'S DECISION IS INCORRECT

The PMPA, by its terms, provides a cause of action for "terminat[ion]" of a franchise. 15 U.S.C. §§ 2802(a)(1), 2805(a). Termination implies a complete end to an agreement—an act that "extinguish[es] future obligations of both parties." 13 *Corbin on Contracts* § 67.2, at 12 (rev. ed. 2003); see also 17B C.J.S. *Contracts* § 447, at 65 (1999). Thus, a mere breach of contract, even if material, does not "terminate" the contract where both parties otherwise continue to perform. Plaintiffs concede that, in the employment and landlord-tenant contexts, a mere breach cannot amount to a "constructive discharge" or "constructive eviction" unless the employee quits or the tenant moves out. Br. in Opp. 17 n.6. They offer no good reason why that same understanding should not apply here.

Plaintiffs urge that "one cannot conceive of a constructive discharge or constructive eviction without a complete break in the employment or landlord relationship." Br. in Opp. 17 n.6. But that proves our point. An employee might claim he was "constructively discharged" because, even though he continued to work at the company, his employer breached an agreement to pay a bonus; or a tenant might assert he was "constructively evicted" because, even though he continued in the premises, the landlord did not give him a promised rent rebate. No one, of course, would accept such transparent efforts to convert ordinary breaches into "terminations." But that merely shows why plaintiffs' parallel theory—that can-

cellation of the rent subsidy "constructively terminated" their franchises even though they continued to operate as franchisees—lacks merit as well.

Nor does Shell's prior assignment of the agreements to Motiva somehow convert Motiva's alleged breach of contract into a "termination." The PMPA explicitly preserves assignment rights. 15 U.S.C. § 2806(b)(1). Plaintiffs cannot explain why, if a mere breach would not implicate the PMPA where the dealer continues to operate, combining that breach with an otherwise valid prior assignment would do so. And even if the assignment mattered, it would not distinguish *Portland 76* or *Clark*, both of which also involved assignments.

Plaintiffs seek refuge in the legislative history's reference to "traditional principles of equity." Br. in Opp. 17-19. But legislative history cannot create a remedy that statutory text omits. See *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). And the cited legislative history merely clarifies that, although the Act preserves state-law assignment rights, it does not license assignments that "conflict" with the "Federal termination provisions." S. Rep. No. 95-731, at 42-43 (1978). That language simply confirms that assignments that result in terminations are invalid. It does not license courts to invoke equitable principles to eviscerate the settled meaning of the word "terminate."[3]

Plaintiffs emphasize their theory that Shell sought to "squeeze them out of their franchises." Br. in Opp. 19-21. But an alleged bad motive cannot transform a breach into a termination. Motive can be relevant to whether a non-

---

[3] Plaintiffs assert that the petition "equate[s] termination with nonrenewal." Br. in Opp. 17. Not so. A termination occurs if the franchisor ends the franchise "prior to the conclusion of the term"; a nonrenewal occurs if it fails to offer a new agreement at the *end* of the term. See 15 U.S.C. § 2802(a); S. Rep. No. 95-731, at 15.

renewal or termination was *justified*. See, *e.g.*, 15 U.S.C. § 2802(b)(3)(A) (failure to agree to new contract terms); *id.* § 2802(b)(2)(E) (withdrawal from market). But nothing in the Act suggests that whether a termination *occurred* depends on the franchisor's motive.[4]

IV. THIS CASE IS AN IDEAL VEHICLE

Plaintiffs' own petition from the same judgment (No. 08-240), which seeks review of the "constructive nonrenewal" ruling, underscores the need for review here. The questions presented in the two petitions are not merely related; they are inextricably linked. Plaintiffs

---

[4] In a footnote, plaintiffs assert that Shell and Motiva failed to preserve their claim by not objecting to the jury instructions. Br. in Opp. 11 n.3. The First Circuit reached the merits without even mentioning that assertion, and with good reason—the argument is doubly meritless. First, Shell and Motiva *did* object to the jury instructions. See C.A. App. 1274 ("If you lose one of the three [statutory franchise] elements, you've got a constructive termination. If you don't, you don't. So I think that we object to this instruction * * *."). Second, the First Circuit addressed this issue, not as a jury-instruction challenge, but in the context of Shell and Motiva's sufficiency-of-the-evidence challenge. Pet. App. 21a. A party need not object to jury instructions to preserve a sufficiency challenge. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 513-514 (1988); 9B Wright & Miller, *Federal Practice and Procedure* § 2537, at 624-625 (3d ed. 2008). Plaintiffs do not dispute that, if Shell and Motiva's construction of the Act is correct, the evidence failed to establish the required termination, since plaintiffs continued to operate their franchises. Nor can plaintiffs plausibly dispute that Shell and Motiva preserved their sufficiency challenge in pre- and post-verdict Rule 50 motions. See Pet. 11; Pltfs. C.A. Supp. App. 118-119 ("[T]here has been no evidence presented to support the Plaintiffs' claim that they have been constructively terminated. * * * Plaintiffs' claim[] * * * is that the Plaintiffs did not like certain changes implemented by Defendants, not that their franchises have been terminated * * *."); *id.* at 156-157 & n.15 ("[O]nly the act of termination * * * gives rise to a PMPA claim. * * * [T]here has never been any claim that Shell terminated plaintiffs' right to occupy the premises.").

themselves urge that "the First Circuit's analysis of the constructive termination claim is incompatible with [its resolution of the] constructive nonrenewal claim." Pet. in No. 08-240, at 29. Given that close relationship, it would make little sense to grant one petition without the other. This Court, for example, could not sensibly affirm the First Circuit's rejection of the constructive non-renewal claims while leaving in place what both sides agree is an irreconcilable ruling on constructive termination. The two petitions involve the same judgment, the same parties, the same record, and circuit splits on twin provisions of the same statute. If the Court is inclined to grant one petition, it should grant both.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. SANSON
VAUGHAN FINN
KAREN T. STAIB
SHIPMAN & GOODWIN LLP
One Constitution Plaza
Hartford, CT 06103
(860) 251-5000

JAMES COWAN
SENIOR COUNSEL
SHELL OIL COMPANY
P.O. Box 2463
Houston, TX 77252-2463
(713) 241-4039

JEFFREY A. LAMKEN
Counsel of Record
ROBERT K. KRY
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

MACEY REASONER STOKES
DAVID M. RODI
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995
(713) 229-1234

Counsel for Petitioners

NOVEMBER 2008